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STATE OF MINNESOTA

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HUBERT H. HUMPHREY III
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April 2, 1998

Secretary, FCC
1919 M Street N.W.
Washington, D.C. 20554

Re: In the Matter of U S WEST Petition For Relief From Barriers To Deployment Of
Advanced Telecommunications Services
CC Docket No. 98-26

Dear Secretary:

Enclosed for filing in the above-subject matter are the original and 12 copies of
COMMENTS OF MINNESOTA DEPARTMENT OF PUBLIC SERVICE plus affidavit of
service on parties.

Sincerely,

J. JEFFERY OXLEY
Assistant Attorney General

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ATTORNEY FOR THE MINNESOTA
DEPARTMENT OF PUBLIC SERVICE

Enclosures

cc: All Parties

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List ABOVE

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STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Charlotte D. Sommers, being first duly sworn upon oath, deposes and says:

That at the City of St. Paul, county and state aforementioned, on the 2nd day of April, 1998, she served the attached COMMENTS OF MINNESOTA DEPARTMENT OF PUBLIC SERVICE by depositing in the United States mail at said city, a true and correct copy thereof, properly enveloped, with first class postage prepaid, and addressed to:

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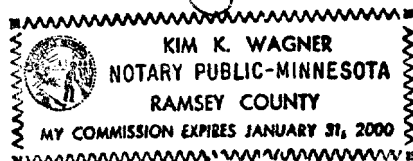
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Charlotte D. Sommers

Subscribed and sworn to before me
this 2nd day of April, 1998.

Kim K. Wagner

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
U S WEST Petition For)
Relief From Barriers To)
Deployment Of Advanced)
Telecommunications Services)

CC Docket No. 98-26

**COMMENTS OF
MINNESOTA DEPARTMENT OF PUBLIC SERVICE**

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April 6, 1998

INTRODUCTION

On March 6, 1998, The Federal Communications Commission (FCC) released an announcement of a comment period for interested parties to respond to U S WEST Communications, Inc.'s (U S WEST) Petition for Relief from Barriers to Deployment of Advanced Services. The Petition asks the FCC to permit the Company to construct and operate advanced service facilities that span its in-region LATA boundaries and to carry traffic incident to digital subscriber line services across LATA boundaries. The Petition also asks that the FCC neither require the Company to unbundle the "nonbottleneck" network elements associated with the interLATA data services and facilities nor to provide these services at a wholesale discount for resale by others. The FCC announced that comments on the Petition were due by April 6, 1998, and replies by May 6, 1998.

The Minnesota Department of Public Services (Department) is a state agency with regulatory and enforcement responsibilities with respect to telephone, gas, and electric services. See, e.g., Minn. Stat. § 216A.07, subd. 2. U S WEST is the largest incumbent local exchange carrier (ILEC) in Minnesota. The Department offers its comments on U S WEST's Petition because granting the relief the Company seeks will produce results contrary to the intent of the Act and hinder the development of competitive markets for all telecommunications services in both rural and urban areas in Minnesota. The best and most efficient means to improve access to both basic and advanced telecommunications services is for the FCC to require ILECs to meet their unbundling and resale obligations under the Act.

In addition to opposing U S WEST's Petition as contrary to the pro-competitive policies that both Congress and the Minnesota State Legislature have enacted, see, e.g., Minn. Stat. § 237.16, the Department specifically opposes the Petition for four reasons: First, granting the Petition would weaken the principle incentive the Act provides for the Bell Operating Companies (BOCs) to open their networks to competitors. Second, section 706(a) cannot be sensibly interpreted to empower the FCC to grant the Petition. Third, no petition by a BOC for relief from section 251(c) or 271 requirements should be granted without the

company also providing: (1) evidence of past substantial efforts to comply with the Act; (2) an explanation of why the company cannot comply with the Act within a reasonable period of time; and (3) a binding timetable for actions by the company to comply with the Act. Fourth, no petition for relief from any regulatory provision should be granted without the petitioner making specific and binding commitments to take actions that will remedy the evil complained of in the event the sought after relief is granted.

ARGUMENT

I. SECTIONS 251(C) AND 271 OF THE ACT CREATE A QUID PRO QUO ARRANGEMENT THAT SHOULD NOT BE UNDONE.

The Telecommunications Act of 1996 sets forth a new framework for the provisioning of telephone service. The intent of the Act is to open up the market for local telephone service in particular, and more generally, the markets for all telecommunications services, to competition. To make competition for local service possible, the Act places a number of duties on incumbent local exchange carriers (ILECs) such as the unbundling of network elements and resale of local service. 47 U.S.C. § 251(c). The Act also rewards the nation's largest ILECs, the BOCs, who fulfill their unbundling and interconnection duties by unshackling them from the line-of-business restrictions of the Modification of Final Judgment (MFJ). 47 U.S.C. § 271. In return for opening their local monopoly market to competitors, the BOCs are permitted to provide interLATA services.

U S WEST will be permitted to provide interLATA services when it meets the requirements of section 271. The Petition does not attempt to demonstrate either that the Company is working towards compliance with section 271 or that it faces some substantial obstacles in meeting section 271 requirements. The Petition entirely disregards this straight-forward solution to removing interLATA restrictions.

U S WEST's Petition asks the FCC to undo the basic quid pro quo structure of the Act by removing the MFJ restrictions on certain of its potentially most lucrative service offerings without the Company committing itself to take any concrete steps towards meeting its

obligations under the Act. It is not sensible for the FCC to accede to a request to significantly weaken the Act's incentives for BOCs to comply with the Act's requirements.

II. SECTION 706(A) OF THE ACT DOES NOT PERMIT THE FCC TO GRANT U S WEST'S PETITION.

A. U S WEST's Suggested Interpretation Of Section 706(a) Negates Key Language Of Section 10 And Invites Regulatory Chaos.

As a threshold matter, the Company contends that although section 10(d) of the Act expressly forbids the FCC from forbearing from applying sections 251(c) or 271, the FCC is nonetheless at liberty to do precisely that under section 706 of the same Act. The Department disagrees.

Section 10(a) specifically provides that the FCC may forbear from applying "any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets" The FCC may forbear from applying "any regulation or any provision of this Act" if three conditions are met. These conditions are that the provision at issue must not be necessary to ensure just, reasonable, and nondiscriminatory charges and practices; that it is not necessary to protect consumers; and that forbearance is consistent with the public interest. 47 U.S.C. § 10(a). In addition, section 10(c) provides a mechanism for telecommunications carriers to petition the FCC to forbear from applying the Act. Section 10(d) states that except for the rural telephone companies who may seek exemption from certain requirements of section 251(c), the FCC may not forbear from applying the requirements of section 251(c) or 271 until they have been "fully implemented."

In contrast to the "any regulation or any provision of this Act" language of section 10(a), section 706 does not specifically permit the FCC to forbear from enforcing any provision of the Act. Instead, section 706(a) only permits the FCC and state commissions to use "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." In section 10(a), Congress distinguishes between "regulations" and

"provisions of the Act." In section 706(a), Congress speaks only of "regulations" and "measures." In section 10(a), Congress grants the FCC forbearance authority only. In section 706(a), Congress grants the FCC and state commissions broad authority with regard to regulations and measures.

An important canon of statutory construction is to give effect to every word and phrase in a statute. U S WEST's reliance on section 706 indicates that the Company interprets "regulation" to include "any provision of the Act." But that interpretation renders the latter phrase meaningless in section 10(a). As such, it is not a permissible interpretation. The FCC should conclude that section 706(a) does not give it the authority to forbear from applying the Act.

In addition to, in effect, deleting words from the Act, U S WEST's interpretation confounds a sensible interpretation of section 10(d)'s limitation on the FCC's forbearance authority. If the FCC cannot forbear from applying sections 251(c) and 271, sections that in practice principally concern the provisioning of local telephone service on which all citizens depend, until their requirements have been met, it makes little sense to permit the FCC and state commissions to do exactly that to enhance the availability of advanced services, which although important, are not a universal necessity.

Another important consequence of U S WEST's interpretation of section 706 is that it permits the balkanization of telecommunications policy. It makes no sense to empower state commissions to forbear, either singly or in groups, from applying the Act when the FCC may decide against forbearance and vice versa. U S WEST's interpretation of section 706 invites regulatory chaos by permitting state commissions and the FCC to make independent, and potentially inconsistent, decisions on whether to apply provisions of the Act.

The FCC should reject an interpretation of section 706(a) that effectively removes critical language from section 10. Nor should the FCC interpret that section in such a way as to assume Congress was willing to sacrifice the Act's central goal of developing competition in all telecommunications services for the narrower objective of improving the availability of

advanced services. Finally, the FCC should not embrace an interpretation of section 706(a) that would permit state and federal authorities to take directly conflicting regulatory actions.

B. The Petition Does Not Provide The FCC With Sufficient Evidence to Permit Forbearance.

Even if it is assumed U S WEST's interpretation of section 706(a) is permissible, other aspects of the section plainly require the Petition be dismissed. The absence of a petition process under section 706 indicates that Congress did not contemplate that the section should provide yet another avenue by which carriers might obtain exemptions from provisions of the Act in addition to their ability to seek such relief under section 10. Section 10 permits the FCC to provide relief from regulation to carriers insofar as it is proven such relief will do no harm to other carriers, consumers, and the public.

In contrast, section 706 is not intended to benefit carriers. Rather, the class of entities intended to benefit from the section are consumers, and, in particular, grade school and high school students. Rather than the "no harm" standard of section 10, action under section 706(a) cannot be taken until the FCC or a state commission first ascertains that advanced telecommunications capabilities are not "reasonably and timely" available to all Americans and second determines that a particular measure will "remove barriers to infrastructure investment." On its face, the Petition falls well short of proving either precondition for action.

The FCC should not contemplate granting the Company's Petition without independently verifying both that advanced services are not reasonably available to the intended beneficiaries of the statute and that the best means to remedy such problems as exist are those the Company has proposed. The most the FCC should undertake in response to the Petition is an investigation into the availability of advanced services to consumers in rural areas in U S WEST's territory. If the investigation uncovers problems, the FCC should determine the most efficacious means of remedying them.

Of course, such actions are precisely what section 706(b) directs the FCC to commence doing by August 8, 1998. The Petition asks the FCC to Act immediately, without

investigation, without verifying the extent and scope of the alleged problems, without contemplating other remedies, without considering the problems on a national level, and without assessing the problems and the potential remedies in the context of the overall goals of the Act. The FCC should decline U S WEST's invitation to act without investigation or thoughtful consideration, especially in light of the statutory directive of section 706(b).

III. THE FCC SHOULD NOT CONSIDER FORBEARING FROM ENFORCING ANY REQUIREMENTS OF THE ACT AGAINST A BOC UNLESS THE BOC COMMITS TO MEETING THOSE REQUIREMENTS WITHIN A SHORT PERIOD OF TIME.

Should the FCC determine that subsection 706(a) grants it authority to set aside sections 251(c) and 271 of the Act, and should it find that advanced services are not reasonably available to all Americans, and should it further find U S WEST's proposal the most effective way to remedy the problem, it would nonetheless be bad public policy and contrary to the central purpose of the Act to grant the Company's Petition. Congress did not authorize the FCC to sacrifice the Act's central objective of promoting competition in all telecommunications services in an attempt to improve only the availability of advanced service offerings. As important as advanced services are, they are only a portion of all telecommunications services. Moreover, the guiding philosophy of the Act is that all services will be better provided through competition.

U S WEST asserts that regulatory barriers have prevented it from providing advanced services to rural areas. It is more accurate to say that the Company's own refusal to comply with the requirements of the Act has resulted in the Congressionally-intended consequence of keeping the MFJ line-of-business restrictions in place.¹

1. In fact, the instant Petition is yet another petition that U S WEST has filed in an effort to avoid either the need to meet the requirements of the Act or escape the consequences of failing to comply with the Act. See, In the Matter of U S WEST's Petition for Waiver of Operations Support Systems Implementation Requirements, FCC Docket No. CCBPol 96-25, Oct. 23, 1997; In the Matter of Petition for Declaratory Ruling Regarding US WEST Petitions to Consolidate LATAs in Minnesota and Arizona, FCC Docket No. NSD-1-97-6, Apr. 21, 1997.

It has been over two years since the passage of the Act. Whereas a number of other BOCs have actively pursued section 271 approval, U S WEST has only just made its first section 271 filing in any state in its fourteen-state region.² The Company has indicated that it anticipates initiating a 271 proceeding for Minnesota and its other states sometime in 1998. TR Daily, Mar. 31, 1998. It appears that the Company believes it either can meet, or has already met, section 271 requirements for Minnesota. The Company's Petition is remarkable in that it seeks relief from section 271 requirements just as the Company has filed in one state to prove that it has met those requirements.

Although the U S WEST has indicated its intent to file for section 271 relief in its other states, the Company has not committed itself to do so. In fact, the Petition asks the FCC to forebear from enforcing the Act without committing the Company to take any action towards gaining section 271 approval, just as the Petition does not commit the Company to undertake any specific actions with respect to the provisioning of advanced services to rural Americans should it be granted.

In addition to proposing the FCC put aside the central motivating mechanism of the Act in return for the Company's commitmentless intimations that it will make advanced services more accessible to Americans in rural areas, the Company further insists that it be exempted from the unbundling and resale obligations of the Act in providing advanced services. U S WEST is not asking the FCC to forbear from enforcing certain minor provisions of the Act; it is asking the FCC to eviscerate the Act with respect to the increasingly important market for advanced services.

The FCC should deny any Petition for forbearance that does not also include an explanation of why the petitioner has not been able to comply with the law despite its best efforts together with a timetable for achieving compliance. U S WEST's Petition does not commit the Company to meeting section 271's requirements. Were the FCC to grant this

2. The Department was advised that the Company filed section 271 materials with the Montana PSC on March 30, 1998.

Petition, it would be giving blanket encouragement to all BOCs to petition for forbearance from their section 251(c) obligations. Insofar as section 271 restricts BOCs from certain lines of business, it is always possible for BOCs to claim that releasing them from those restrictions will promote competition and permit them to better serve some class of customers -- the restrictions would not be restrictions otherwise. Such self-serving claims should be given careful scrutiny.

IV. THE FCC SHOULD DENY THE PETITION BECAUSE IT DOES NOT COMMIT U S WEST TO SPECIFIC ACTS TO BENEFIT RURAL AMERICANS AND INSTEAD SEEMS MOST LIKELY TO PERMIT THE COMPANY TO BETTER COMPETE IN URBAN MARKETS WHICH ARE COMPARATIVELY WELL-SERVED.

Although the Department strongly opposes granting U S WEST's Petition, the Department does agree with the Company that Americans in rural areas would benefit from lower cost access to advanced services. However, the Department finds nothing in the Petition to inspire any confidence that granting U S WEST's request will actually result in providing that benefit to rural Americans. In fact, the illustrations in the Petition raise concerns that the Company's proposal is actually intended to advance a rather different agenda.

The illustrations in the Petition show that at least eight companies have developed backbone networks for advanced services across the country. Illustrations 1 through 8 show the many locations across the nation where these companies have placed DS3 backbone facilities. The illustrations do not purport to be exhaustive and so there may be other companies who have placed similar facilities in the same or different locations. In the not-too-distant future, either the eight named companies and/or other providers may very well place additional facilities. The Petition generally conveys the impression that the market for advanced services is growing rapidly.

Illustration 12 shows that U S WEST is a substantial participant in this market. The Company has developed a backbone network out of its region. The Company has also placed facilities within its region. All of these placements, both in-region and out-of-region, are in

population centers. The vast majority of the Company's placements are in locations where its competitors have installed facilities.

None of the illustrations suggest that any provider has found that there are sufficient markets for advanced services in rural areas to deploy such facilities in those areas. The other companies whose networks are pictured are not subject to LATA boundary restrictions and may place facilities wherever they wish. It appears that none have chosen to place facilities in rural areas despite the fact that no regulatory barriers either prohibit or "artificially" raise the costs of such placements.

The Company's illustrations raise the question of why U S WEST should find it profitable to place facilities for advanced services in rural areas when no other company has done so. Several points should be carefully considered in this regard: First, it may be that U S WEST, as the incumbent provider who is already connected to the vast majority of telephone subscribers in its region, has particular cost or marketing advantages in serving rural subscribers. Indeed, the central proposition of the Act is that the decades old monopoly enjoyed by the BOCs gives them a substantial advantage over competitors. The purpose of the Act is to open ILEC markets to competition, not to preserve the advantages of monopoly for them. The FCC should not forbear from enforcing any part of the Act so as to perpetuate the advantages enjoyed by the BOCs as monopoly providers.

Second, if the FCC determines that the Company does not have any particular cost or marketing advantages in rural areas with respect to advanced services, the FCC should suspect that the Company will be as unlikely to place facilities in such areas as other providers have been. Those opportunities have been available to other companies and as U S WEST's illustrations reveal, they have not taken advantage of them.

Third, the Company has not promised to place facilities in rural areas. Rather, its plans seem principally to involve the connection of major population centers within U S WEST's fourteen-state region. Consequently, the FCC should consider the possibility that the Company's major interest in evading the Act is not to serve rural areas better, but instead to

improve its ability to compete with other companies in providing advanced services in major population centers. Granting U S WEST's proposal would enable the Company to offer its in-region customers access to a national backbone network that would rival the networks of other companies. Granting the Petition would thus enable U S WEST to better compete in markets that already have multiple providers. In fact, it appears that facilities are already in place in the major population centers within U S WEST's region to do just that. Although the Company's proposed network suggests it will construct additional in-region sites, the Petition does not commit the Company to doing so at all, much less in a timely fashion.

The FCC should deny any petition for forbearance from section 251(c) and 271 by a BOC in which the petitioner does not commit to a specific, concrete course of action if the petition is granted. A petition which requested section 271 forbearance with respect to a facility in Sioux Falls, South Dakota, and further committed the company to installing such a facility and to providing advanced services at lower cost, might merit consideration, assuming that the FCC had authority to forbear from enforcing section 271.³ A petition requesting blanket forbearance across a fourteen-state region in which the petitioner makes no commitment to actually do anything, merits no consideration. The FCC should insist that concrete results directly and immediately flow from any act of forbearance under section 706(a) and that any company requesting forbearance must actually provide a benefit to the consumers who are the intended beneficiaries of the section.

3. This is not to suggest the FCC should forgo requiring the petitioner to commit to a compliance schedule for meeting section 271 requirements. Nor is it to suggest that such a proposal might merit forbearance of section 251(c) requirements.


CONCLUSION

The FCC should deny U S WEST's Petition. The Petition asks the FCC to put aside the cornerstone requirements of the Act in return for which the Company promises nothing. The Petition further advances untenable interpretations of sections 10 and 706 of the Act. The only certain result of granting the Petition will be to encourage the Company to continue to delay in meeting its obligations under the Act and so deny all subscribers in U S WEST's fourteen-state region the full benefits of competition.

Even if the FCC determines that it has the authority to grant the Petition, it should deny any section 706(a) petition from a BOC seeking forbearance from section 271 that does not also include an explanation of why the petitioner has been unable to comply with the law despite its best efforts together with a timetable for achieving compliance. In addition, a company who requests forbearance and who will benefit from forbearance should make binding commitments to provide actual benefits to the consumers who are the intended beneficiaries of section 706(a).

Dated: April 6, 1998

Respectfully submitted,



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